85-1438

No.

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLOTTE MEMORIAL HOSPITAL AND
MEDICAL CENTER, ET AL,

Petitioners,

v.

WILMA OLIPHANT, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN O. POLLARD
WHITEFORD S. BLAKENEY
Attorneys for Petitioners
and Counsel of Record
3700 NCNB Plaza
Charlotte, NC 28280
(704) 372-3680

Of Counsel:
BLAKENEY, ALEXANDER & MACHEN
Charlotte, NC

TOPP

QUESTION PRESENTED FOR REVIEW

When, in a suit under 42 U.S.C. §2000e-2, it is asserted on behalf of a "class" of black persons that, throughout a period of years, they had been individually discharged from the defendants' employment "because of" their race and therefore in violation of law - and when the defendants, at the direction of the trial Court, delivered to the plaintiffs and their attorneys written records regularly maintained by the defendants in the course of business, setting forth the names of each of such discharged persons and the cause and reason for each of such discharges - and when the plaintiffs, making no effort to attack or refute such stated and recorded reasons and causes, relied instead upon statistical

disproportion or "imbalance" in the percentage of black employees discharged as compared to the percentage of white employees discharged - and the trial Court, in such situation, having nevertheless ruled that, in view of the aforesaid "imbalance," each and all of the black persons discharged are to be presumed to have been discharged "because of" their race - is not such ruling plainly erroneous in view of the reiterated holdings of this Court as to what are the essential subjects of proof and the proper sequences of proof and of shifts in the burdens of proof in litigation under this Statute?

LISTING OF ALL PARTIES IN THE CASE

The plaintiffs in this case are Wilma Oliphant, Terry Ragin, Bernice Howie, Bertha Anderson and Ruth Coleman,

"individually and on behalf of all others similarly situated."

The defendants in the case, now Petitioners to this Court, are Charlotte Memorial Hospital and Medical Center, and Charlotte-Mecklenburg Hospital Authority.

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OPINIONS OF THE COURTS BELOW

The opinion and the rulings of the United States District Court for the Western District of North Carolina are interspersed throughout numerous orders and memoranda and statements of findings and conclusions in this case and are not published. The pertinent portions thereof are, however, summarized in the Opinion of the United States Court of Appeals for the Fourth Circuit - and that Opinion, though likewise unpublished, is reproduced in an Appendix which is attached to this Petition.

JURISDICTION OF THIS COURT

The Opinion of the Court of Appeals, embodying its decision and judgment is dated October 10, 1985, and was entered on that date.

Thereafter, within apt time, the Petitioners filed with the Court of Appeals a Petition for Rehearing, which was denied on November 29, 1985. The filing of this Petition for Certiorari is within ninety days from the date of the denial of rehearing.

Jurisdiction to review the decision of the Court of Appeals by writ of certiorari is conferred on this Court by the provisions of 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

"It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2

STATEMENT OF THE CASE

The Petitioners believe that everything pertinent to a statement of the

case is elsewhere set forth in this Petition - in the "Question Presented For Review" and in the "Reasons For The Granting Of A Writ Of Certiorari" - and that in the interest of brevity, it would seem not needful to repeat the same at this point.

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

The defendants have approximately 3500 employees. The black persons who have been individually discharged from time to time during the approximately ten year period covered by this case - and who are declared to be within the "class" hereinabove referred to and represented by the named plaintiffs - are probably 600 to 700 in number.

What are the standards and principles

of proof properly applicable to the cases of these hundreds of former employees? Such standards and principles have, of course, been painstakingly developed and enunciated by this Court in Texas Department v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981) and its antecedent and related caes, such as McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct, 1817 (1973), Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977), Furnco Construction Corp. v. Waters, 438 U.S. 567, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24, 58 L.Ed.2d 216, 99 S.Ct. 295 (1978).

The decision of this Court in Burdine is very clear and precise on these matters.

"First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, non-discriminatory reason for the employee's rejection'. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination."

Texas Department v. Burdine, 450 U.S. 248, 252-253, 67 L.Ed.2d 207, 215 (1981)

"The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

Idem, 450 U.S. 253, 67 L.Ed.2d 215

"The Court of Appeals has misconstrued the nature of the burden that McDonnell Douglas and its progeny place on the defendant . . . We stated in Sweeney that the employer's burden is satisfied if he simply 'explains what he has done' or produc[es] evidence of legitimate non-discriminatory reasons.' "

Idem, 450 U.S. 256, 67 L.Ed.2d 217

It goes without saying that the Courts

below would not consciously disregard these precepts, which have been so clearly and firmly laid down by this Court. Nevertheless, it is readily demonstrable that in the present case, both of the lower Courts have in crucial respects failed to observe and implement these principles.

The Court of Appeals raised "question" as to the District Court's ready adoption of the concept that imbalance between the rate of discharge among the defendants' black employees as compared to the rate of discharge among the defendants' white employees can, in and of itself, be sufficient ground to support a prima facie case of unlawful discrimination by the defendants against their black employees under 42 U.S.C. §2000e-2.

The defendants would agree with the Court of Appeals' expressed doubt on that, but the defendants cannot deny that current decisional trends may furnish ground for the appellate court's proceeding to affirm the District Court on that point. The defendants submit, however, that from that point on, the rulings of both the Courts below erred completely.

Assuming that the statistical disparity above referred to raised a prima facie case against the defendants in behalf of all black employees of the defendants, still Burdine and its related cases establish unequivocally that if, for example in matters of employee discharges, (a) the employer "articulates" or otherwise presents

lawful reasons for employee discharges, and if (b) the discharged employees do not "prove by a preponderance of the evidence" that such declared reasons are pretexts, then the prima facie case, of unlawful action on the part of the employer, dissolves. The crux of the present case is that the defendants did perform "a" - and that the plaintiffs did not even purport to perform "b".

The Court of Appeals says that the defendants "failed to make" any "attempt" to articulate or present reasons or causes for the discharges of employees and that there is no "credible evidence that the cause of the disparity in the termination rates" was anything other than "unlawful discrimination" against black employees (Appendix to this Petition,

pp. 17a, 19a). It is respectfully submitted that there is no evidence whatever in the record to support that statement - and all the evidence is to the contrary.

The state of the record in this case with regard to the defendants having and showing reasons and causes for discharging employees, black and white is as follows. Ella Williams was a paralegal in the employment of the plaintiffs' attorneys. She testified that the defendants "provided" to her "computer printout sheets" and "personnel files" which she "personally" inspected - that the period "covered by these records was "1975 through July of 1979" - that the "information that was set forth" in these records included the employees' "job code numbers" and "names"

and "date of hire" and "a termination column that gave the date of termination" and "a 'reason' column that gave the reason for the termination" and "a column that included race code" (Joint Appendix in the trial Court, pp. 1356-1357).

Ms. Williams further testified that plaintiffs' "Exhibit 4" in the case "shows the terminations in the entire workforce for the years 1975 through 1979" - that "Exhibit 4" was provided to "the plaintiffs by" the defendants and that it lists "reasons for terminations" by "alphabetical identification," and that "they were listed on the computer sheets" by these identifications (Joint Appendix in the trial court, pp. 1360, 1361).

The defendants' Exhibits 5 through 9

list all "Involuntary Terminations" during each of the years 1975 through 1979 - and show the number of "white employees" and the number of "black employees" discharged for each cause listed alphabetically on the same exhibits (Joint Appendix in the trial court, pp. 3611-3615). Such reasons and causes are, in turn, stated and listed alphabetically on the defendants' "termination code" sheet, which is likewise in evidence (Joint Appendix in the trial Court, p. 145).

With such personnel files and computer sheets and termination codes in their hands, the plaintiffs thus have had - since long before the District Court trial - full access to the defendants' records of reasons and explanations for the discharge of each person, black or white, who has

been thus terminated through the years.

Yet the "class" represented by the named plaintiffs have not seen fit to challenge the truth and accuracy of the information and explanations set forth in such records. The great bulk of the 600 to 700 persons in the "class" represented by the plaintiffs apparently choose not to venture on individual contests but to remain instead in the "class" and rely on the presumption, decreed by the Courts below, that each and every person in the "class" has been unlawfully discriminated against by the defendants - for which each and all hope eventually to receive high compensation.

In summary, the situation is as follows:

(1) The decisions of the Courts below

fasten upon the defendants a presumption of liability on the part of the defendants to a "class" of some 600 or 700 employees - as a result of alleged unlawful discharges.

(2) The defendants, availing themselves of the opportunity assured to them by Burdine, have established that they have not unlawfully discharged the members of this "class."

(3) The members of the "class," failing to avail themselves of the opportunity assured to them by Burdine, have not established that the defendants' explanations of such discharges were pretextual.

(4) This state of affairs constitutes a stalemate because the decisions of the Courts below, establishing presumption of unlawful discharges by the defendants of

the members of the "class", remain in effect.

(5) This stalemate can only be broken by this Court's granting review of the case and enforcing upon all parties the principles of Burdine.

Upon all of the foregoing, the defendants pray that the Court grant this Petition for Certiorari.

John O. Pollard
Whiteford S. Blakeney

Attorneys for the Petitioners

Of Counsel:

Blakeney, Alexander & Machen

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1772

Wilma Oliphant; Terry Ragin; Bernice Howie; Bertha Anderson; Ruth Coleman, individually and on behalf of all others similarly situated; Charles Norwood; Lula B. Miller; Evelyn Alexander; Yvonne Sessoms; and Bertha Chisholm; Lilie Ann Stewart; Antwerp Duncan; Mildred Glenn; Charlotte Chapter of the Old North State Medical, Dental and Pharmaceutical Society; and Pamela Bennett; Kim Wallace; Randy Tucker; Roberta Sasportas; Anita Singley;

Appellees,

Versus

Charlotte Memorial Hospital and Medical Center; Charlotte-Mecklenburg Hospital Authority,

Appellants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge (C/A 78-326 & 78-370)

Argued: Aug.10, 1984 Decided: Oct.10, 1985

Before RUSSELL, HALL and CHAPMAN, Circuit Judges.

John O. Pollard, Richard F. Kane (Blakeney, Alexander & Machen on brief) for Appellants; John T. Nockleby (J. LeVonne Chambers, Chambers, Ferguson, Watt, Wallas & Adkins, P.A. on brief) and Michael A. Sheely (Sheely & Gronquist on brief) for Appellees

CHAPMAN, Circuit Judge:

This is an appeal from findings of fact and conclusions of law made by the district court in two employment discrimination suits consolidated for trial. The district court found that the Charlotte Memorial Hospital and Medical Center and the Charlotte-Mecklenburg Hospital Authority (hereinafter "Hospital") had discriminated against black employees and established a class of employees entitled to relief. The court also made findings in favor of individual plaintiffs, intervenors, and

members of the class. The defendants claim error (1) in the manner in which the district court arrived at its findings and conclusions, (2) in its finding that the defendants engaged in classwide racial discrimination, and (3) in its findings as to the individual plaintiffs, intervenors, and class members. We affirm in part and reverse in part.

I

In November 1978 Wilma Oliphant, Terry Ragin, Ruth Coleman, Bertha Anderson, and Bernice Howie brought an action in the United States District Court for the Western District of North Carolina against the Hospital. Each plaintiff claimed that the Hospital terminated her because of her race or because of her opposition to practices made illegal by Title VII. About

six weeks later Charles Norwood, Evelyn Alexander, Yvonne Sessoms, and Lula B. Miller filed an action against the Hospital, alleging that the Hospital took various adverse employment actions against them because of their race. The Oliphant plaintiffs sought to establish a class composed of all blacks employed in clerical positions at the Hospital, and the Norwood plaintiffs sought a class consisting of black applicants for employment as well as black employees of the Hospital. Prior to trial the district court certified a class in the Oliphant case as follows:

> Plaintiffs, all blacks currently employed by defendant Hospital in clerical positions and all blacks employed by defendant at any time since December 6, 1975, in a clerical position who are not currently employed; all of whom have been or

> may have been discriminated against in reference to defendants' policies governing promotion, transfer, job placement, termination, discipline, and unfair job performance evaluations on account of their race.

The district court then consolidated the two actions and certified a class as follows:

> All black applicants for employment or training with and all black employees of defendant Charlotte Memorial Hospital and Medical Center who, at any time since April 24, 1972, have been denied employment or training opportunities, promotions, transfers, equal wages or who have been denied equal performance evaluations, disciplined or discharged in a discriminatory manner because of their race and color or in retaliation because of their efforts to exercise rights under Title VII. This class includes both professionals and non-professionals.

All claims of professionals - physicians, dentists, and nurses - were settled before the trial was concluded.

In its findings of fact and conclusions

of law, the district court modified the class certification and defined the class as follows:

> All black employees of defendants who have worked in or who have sought or have been assigned to non-professional job positions (technical, skilled, semi-skilled and labor) who, at any time since October 13, 1973, have been discriminatorily denied a job, or discriminatorily assigned to a job, or discriminatorily denied transfer to a job, or discriminatorily discharged or subjected to retaliatory treatment or actions, because of race or color.

The Charlotte-Mecklenburg Hospital Authority is a public corporation chartered by the State of North Carolina. The Hospital Authority owns and operates the Charlotte Memorial Hospital and Medical Center, a complex medical service and training facility. During the ten years prior to trial the Hospital employed approximately 3500 persons of whom 38 to 39 percent were

black. There were 450 job codes for employees of the Hospital of which 60 required some type of license, certification or registry. There were approximately 50 divisions or departments in the Hospital ranging in skill from the janitorial to the staff positions. The Hospital director, deputy director, and seven associate directors have been and are now all white. The directors of the medical and dental programs and the director of legal affairs have always been white. No black has ever served as manager of any of the 50 departments, but blacks have held some assistant managerial positions and some supervisory jobs in nursing, pharmacy, environmental services (janitorial), and laundry.

In 1979 eighteen of the fifty

departments had no black employees and about seventy percent of the black employees were in nursing, environmental services, dietary or food handling, laundry and central services. A racial breakdown on these departments in 1975 and 1979 is as follows:

	1975		1979	
	White	Black	White	Black
Nursing	1135	596	1082	495
Environmental Services	33	146	23	174
Dietary	88	226	67	159
Laundry	3	52	5	54
Central Services	16	70	5	50

Black employees were concentrated in the lower paying jobs. Wage differentials between black and white employees with comparable education, length of service, departmental assignment, and work schedules ranged from twenty-nine cents

per hour in 1975 to sixty-four cents per hour in 1978. Supervisory personnel in the majority black departments were mostly white. Black supervisory personnel often were required to work with their crew, while white supervisors only supervised and directed. In environmental services the uniforms of white and black supervisors were different.

In its employment practices the Hospital did not post notices of vacancies until 1978, and at that time the posting was only in the personnel office. By mid 1979 vacancies were posted in the rest of the Hospital on a regular basis. Employees were not advised of upcoming job vacancies even in their own departments. Persons selected by management for promotion or transfer were individually and privately

consulted before the vacancy occurred. In the personnel office lists of vacancies were kept secret from the public and from applicants, and personnel interviewers did not discuss vacancies with applicants until they determined in which vacancy the applicant was interested.

The Hospital's hiring, promotion, and discharge policies were neither complete nor current. As a result, these policies were never available for supervisors to consult. No written criteria was available to personnel officers to guide them in choosing among applicants and employment decisions were based upon primarily subjective opinions and judgments. Supervisors also used subjective judgments in promotional and transfer decisions.

The district court heard this case

in October 1981 and rendered its final findings of fact and conclusions of law in favor of the plaintiffs in June 1983. The Hospital appealed and asserts that the district court erred in three areas: (1) the class certification; (2) the manner in which it developed its findings of fact; and (3) the specific findings of fact as to the individual named plaintiffs.

II

The first issue we must confront concerns the Hospital's contention that the district court incorrectly treated this action as a disparate impact case instead of a disparate treatment case. The Hospital argues that the plaintiffs' evidence failed to meet the requirements of a disparate treatment case on the class claims and thus the district court erred in

finding for the plaintiffs on this issue. We disagree. The differences between disparate impact and disparate treatment cases are clearly explained in EEOC v. Federal Reserve Bank of Richmond, 698 F. 2d 633, 638-39 (4th Cir. 1983), rev'd on other grounds sub. nom. Cooper v. Federal Reserve Bank of Richmond, 52 U.S.L.W. 4853 (U.S. June 24, 1984); Pope v. City of Hickory, 679 F.2d 20, 22 (4th Cir. 1982); and Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 274 n. 10 (4th Cir. 1980). We need not review those differences here. Plaintiffs presented sufficient evidence of disparate impact by the Hospital for the district court to treat it as such.

The Hospital had certain rules and practices that may be viewed as creating

a disparate impact. These rules and practices included:

(1) The existence of a no transfer policy which seems to have been applied to blacks but not to whites[1];

(2) The failure to post vacancies;

(3) The failure to publish job descriptions;

(4) The preselection of white persons by supervisory personnel for vacancies prior to the announcement of the existence of a vacancy; and

(5) The existence of non-job related education requirements.

Although we disagree with the Hospital's claim that the district court

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[1]There was evidence to support a finding that whites were occasionally allowed to transfer laterally but that blacks were not.

incorrectly treated this as a disparate impact case, we must still review the district court's decision concerning the class claims. The determination of the composition of a class is a matter resting within the discretion of the district court. We must affirm the determination of the district court unless the district court has abused its discretion. See Windham v. American Brands, Inc., 539 F.2d 1016, 1070 (4th Cir. 1976).

The district court created five sub-classes:

(1) Those discriminatorily denied a job;

(2) Those discriminatorily assigned to a job;

(3) Those discriminatorily denied transfer to a job;

(4) Those discriminatorily terminated; and

(5) Those discriminatorily subjected to retaliatory treatment or actions.

Of these five subclasses we must reverse the district court's findings as to the first. The first subclass consists of those who were discriminated against in hiring. The district court created the subclass although there is no evidence in the record that the Hospital discriminated against anyone in hiring.

The exhibits show that the Hospital hired a much larger percentage of black employees than the percentage of blacks in the labor force in the Charlotte area. Furthermore, of the named plaintiffs, only Lula Miller made a claim of failure to hire. The district court, however,

found that the evidence was not sufficient to rule on her case. Because the only claimant of discrimination in hiring did not submit sufficient evidence concerning that discrimination, there was insufficient evidence to support the creation of such a subclass.

We also question the district court's finding that a class should be created consisting of those persons discriminatorily terminated. Nevertheless, because of the panel opinion in Lilly v. Harris-Teeter Super Market, 720 F.2d 326 (4th Cir.1983), we are forced to affirm the district court's creation of this subclass. In Lilly we held that a plaintiff in a discrimination case makes out a prima facie case of classwide discrimination in terminations through statistical evidence which

conclusively rules out chance as the cause of a disparity in termination rates. Lilly, 720 F.2d at 336 n. 20. The plaintiffs did so here.

The burden then shifts to the defendant to come forward with a credible, lawful explanation for the disparity. Id. In this action, because it was tried before Lilly was decided, the Hospital simply failed to make this attempt. Instead, the Hospital argues that although plaintiffs' statistical evidence showed that blacks were involuntarily terminated at a rate that exceeded their representation in the work force, the blacks were nevertheless discharged for cause. Accordingly, the Hospital contends that the burden should shift back to the plaintiffs to prove that the terminations were not for cause

or to show that the Hospital otherwise acted in a discriminatory manner in its termination policy. This same point was discussed in the Lilly case. See 720 F.2d at 337 n. 22.

In Lilly this court explained:

> Harris-Teeter advanced no explanation for the disparity between the black and white termination rates, instead arguing that the plaintiffs' statistics "showed only that both blacks and whites had committed dischargeable offenses and had been discharged." That assertion is plainly incorrect, for the standard deviation analysis demonstrates that the significant disparity between the termination rates was not due to chance, but instead to some other cause. That cause is presumed to be unlawful discrimination until the defendant shows otherwise, and Harris-Teeter failed to do so here.

Id. The Hospital had to do more than simply claim that the terminations were for cause. It had to attack the statistical analysis used by plaintiffs or

present evidence from the individuals who fired the employees that each specific employee was fired for cause or otherwise present credible evidence that the cause of the disparity in the termination rates was not due to unlawful discrimination. The Hospital has failed to point to any such evidence in the record. Accordingly, we must affirm the creation of this sub-class.

We have also considered the other sub-classes created by the district court. There is evidence to support the creation of these sub-classes and we cannot say that the district court abused its discretion in doing so.

III

The second issue we must consider concerns the manner in which the district

court developed its findings of fact. The trial of this case began October 21, 1981, and concluded October 30, 1981. On December 2, 1981, the district court filed its Memorandum of Decision and Order of nine pages in which it set forth its findings with reference to patterns and practices of racial discrimination by the defendants and also its findings as to the claims of the named plaintiffs and class members. At the conclusion of this Memorandum of Decision and Order, the district court stated:

> Based upon the above brief findings and conclusions, it is ordered:
> 1. That the parties submit for consideration and approval their settlement of the claims relating to professional employees.
> 2. That the parties meet in the same room and talk seriously and at length about the possibility of a compromise settlement of the claims of each of the persons discussed

above who the court has indicated are entitled to relief.

3. They are directed to report to the court in writing by January 4, 1982, as to the results of their discussion.

4. The court will take whatever action thereafter as is indicated by the report on conversations about settlement.

5. If the settlement does not materialize, the court will:

(a) Instruct the plaintiffs to draw detailed findings of fact and conclusions of law in support of the decisions previously indicated.

(b) Issue an order finally constituting the class.

(c) Require a notice to the class.

(d) Consider a petition for interim fees.

(e) Issue an order respecting stage II proceedings.

The parties were unable to reach a settlement and the plaintiffs' attorney submitted sixty-two pages of proposed findings of fact and conclusions of law. The defendants made general objections to these proposed findings and conclusions,

but did not submit proposed findings and conclusions because of the district court's order which instructed:

> Defendants will be allowed until May 10, 1982, to file not a "pleading" but specific objections and proposals with respect to the documents.
>
> However, whatever is filed must be specific responses to particular sentences of the present drafts, and must be in the form of either a text of a specific change in place of specific language, or a request that particular quoted language or particular described language be deleted. I do not wish to re-edit a series of documents this lengthy at this late date, other than as aided by objections and exceptions drafted as herein described.

The district court did certain editing of the first draft of the proposed findings of fact and conclusions of law and returned it to the plaintiffs' attorney who submitted a new draft containing ninety-seven pages. The district court edited this

submission and, on June 20, 1983, filed its thirty-one pages of findings of fact and conclusions of law. On the first page of this document the district court took note of our decisions in Miller v. Mercy Hospital, Inc., 720 F.2d 356 (4th Cir. 1983); Lilly v. Harris-Teeter Supermarkets, Inc., 720 F.2d 326 (4th Cir. 1983); Cuthbertson v. Biggers Brothers, Inc., 702 F.2d 454 (4th Cir. 1983); EEOC, et al v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983); and Anderson v. City of Bessemer City, North Carolina, 717 F.2d 149 (4th Cir. 1983), rev'd., 53 U.S.L.W. 4314 (U.S. Mar. 19, 1985), in which we criticize the practice of the district court adopting findings of fact and conclusions of law prepared by the attorney for the prevailing party after

the court had announced its decision in general and conclusory terms. In response to these decisions the court observed:

> However, in view of the condemnation in recent cases by the Fourth Circuit Court of Appeals of the use by judges of findings and conclusions prepared by counsel, I have not adopted counsels' work but have, at considerable labor, prepared the following. Because it tries to be faithful to the facts, it smacks heavily of the contents of the original memorandum and of the plaintiffs' offering. It is "an ill favored thing, Sir, but mine own," - and I trust it will be treated as "mine own" by any who read it.

Touchstone, of Ardrey, W. Shakespeare, As You Like It, Act. V, Scene iv, l. 60.

The Supreme Court, however, recently reversed our decision in Anderson, supra. In its decision the Supreme Court discussed the problem of a district court adopting proposed findings of fact and conclusions of law submitted by the prevailing party.

It stated:

> We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record. See, e.g., United States v. El Paso Natural Gas Co., 376 U.S. 651, 656, 657 (1964); United States v. Marine Bancorporation, 418 U.S. 602, 615, n. 13 (1974). We are also aware of the potential for the overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge will decide in their favor. See J. Wright, The Non Jury Trial - Preparing Findings of Fact, Conclusions of Law and Opinions, Seminars for Newly Appointed United States District Judges, 159,166 (1962). Nevertheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. United States v. Marine Bancorporation, supra, at 615, n. 13; United States v. El Paso Natural Gas Co., supra, at 656-657.
>
> In any event, the district court in this case does not appear to have uncritically accepted findings

> prepared without judicial guidance by the prevailing party. The court itself provided the framework for the proposed findings, when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them. Further, respondent was provided and availed itself of the opportunity to respond at length to the proposed findings. Nor did the district court simply adopt petitioner's proposed findings; the findings it ultimately issued - and particularly the crucial findings regarding petitioner's qualifications, the questioning to which petitioner was subjected, and the bias on the part of the committeemen - vary considerably in organization and content from those submitted by petitioner's counsel. Under these circumstances, we see no reason to doubt that the findings issued by the district court represent the judge's own considered conclusions. There is no reason to subject these findings to more stringent appellate review than is called for by the applicable rules.

53 U.S.L.W. at 4316.

In reviewing the procedure used by the district court, as outlined above, we conclude that his solicitation of findings of fact from the plaintiffs' attorneys, with an opportunity for the defendants' counsel

to object to the plaintiffs' submission and the district court's final editing of the submission passed muster under Anderson, supra.

IV

The Hospital also urges us to reverse the findings of fact concerning the individual plaintiffs. We must review all findings of fact under the provisions of Federal Rules of Civil Procedure 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

WILMA OLIPHANT

The named plaintiff, a black female, was hired on August 23, 1976, as an audit and cost clerk in the business

office of the Hospital. A high school graduate, she had taken business courses at Central Piedmont Community College, but had not completed the two year course and did not have a certificate from the college. She had worked previously for the North Carolina National Bank as a proof operator. Her job at the Hospital was to handle Medicare and Medicaid vouchers received from the Medicare department and to break them down into the number of days and the amount of money to be paid to the Hospital under these programs. Her immediate supervisor was Hartsell Sweatt.

From August 1976 until October 1976 Oliphant and Sweatt worked side by side at a work table. During this time she claims that Sweatt rubbed his leg against hers. In late October she complained to the head

of the business office about Sweatt's behavior. At this time two white female employees complained of the same actions by Sweatt against them. Wayne Short, the head of the business office, reprimanded Sweatt in November 1977 and Oliphant was moved from the work table to a desk behind a partition where the other employees worked.

As a result of the reprimand Sweatt submitted his resignation, but the two white female employees went to Short and explained that they believed that Sweatt had no wrong intentions in his actions and suggested that the resignation be withdrawn. Oliphant did not participate in the effort to have Sweatt withdraw his resignation. Sweatt later withdrew his resignation.

Oliphant testified that afterwards he

harassed her, finding errors in her work, asking where she was going, asking her to whom she made phone calls, making sure that she was doing her work, and admonishing her not to punch in on the time clock early and to begin work when she arrived. She testified that he did not treat other employees this way. In her testimony, however, there is no indication that she was treated differently because of her race.

The district judge found that from the first interview she was sexually harassed by Sweatt, but the testimony does not support this finding. Furthermore, the district court's conclusion as to the cause of the discharge is totally lacking in support. The district judge found:

> Oliphant's discharge on August 2, 1977, was based on racial discrimination. Defendant's claim that she was discharged for putting the wrong code number on a form is pretextual. She was discharged because of her complaints to management and to EEOC, about Sweatt and about the Hospital's racial practices, and for her request for other jobs in order to avoid contact with Sweatt. Defendant's explanations, including the handling of "anecdotals," are pretextual.

The record clearly shows that no complaint was made to the EEOC until August 11, nine days after Oliphant was discharged. There is no testimony to support a finding that Oliphant made complaints to the Hospital management about Hospital racial practices. In November 1976, shortly after she had reported to Short that Sweatt was rubbing his legs against hers, she asked for a transfer to the health room and was interviewed for this job. She turned the job down because she felt that she could

not type fast enough. In February 1977 she interviewed for another job and again decided that she could not handle it because of her lack of typing skills.

Oliphant and Sweatt worked side by side until Oliphant accused Sweatt of sexual harassment. The evidence shows a continuing deterioration in their working relationship after the allegation was made and after the other female employees withdrew their similar complaints about Sweatt. However, there is nothing in the evidence to support a finding that race was a factor in this clash of personalities. Thus, the district court's finding is clearly erroneous.

TERRY RAGIN

Terry Ragin, a black female, graduated from high school and attended college for

two years. The Hospital hired her in February 1976 as a collection officer in the business department. In April 1976 she complained to her supervisor, Betty Dollinger, and Dollinger's supervisor, Robert Sullivan, that other employees in the collection office were making racist comments about black patients who had not paid their bills. Dollinger testified that she warned the employees about such comments and the comments stopped, but Ragin testified that proper steps were not taken to stop the alleged racist comments.

In September 1976 Ragin argued with a white employee, Joni Jackson. Ragin could not remember who started the argument, but during the argument Jackson called Ragin a "nigger" and Ragin told Jackson that she was going to "kick her motherfucking ass."

Ragin admitted the use of this type of language on a number of occasions.

Although both employees were written up for this incident in an anecdote, the conflict between Jackson and Ragin continued. Betty Dollinger, the supervisor, attempted to reconcile the problem. Ragin testified "I said I'm not kissing her [Dollinger's] behind."

She also told Mrs. Dollinger to go ahead and fire her and they would settle the matter in court. She acknowledged that she had received several warnings because of her conduct and had applied for a transfer, but withdrew the application "because I felt I would stay in the collection department and stick it out. I wasn't going to run."

The collection office worked more than

one shift and Ragin complained to Dollinger that the nightshift was working on account files that she had on her desk and wanted to handle herself. Again she told Dollinger that she would not "kiss her behind" in doing her work. She was written up in an anecdotal for insubordination and being continually uncooperative. This resulted in a meeting of Dollinger and Ragin with Carl Moss, the business office manager. Moss advised Ragin in writing that any further shouting in the office, use of profane and vulgar language, harassment and intimidation of fellow employees or insubordination would result in her termination.

On September 29, 1977, Ragin and Jackson again quarreled, each calling the other "white scum" and "black scum." Ragin

again threatened to kick Jackson's "mother-fucking ass." As a result of these encounters, twenty-two employees of the office signed a petition stating: "The outbursts and threats of Terry Ragin makes [sic] fear and bad working conditions for all members of this office. Action to remove this condition is requested. Ragin was offered a transfer but turned it down because she did not wish to work on week-ends.

On October 9, 1977, Ragin was discharged after a meeting with Robert Sullivan. Sullivan testified and also prepared a memorandum contemporaneous with the event which stated that Ragin had burst into his office and accused him of talking about her with other employees. Three times she stated, "I will hurt you."

Ragin admitted the meeting but denied any threats.

The district court found:

> Terry Ragin was in fact discharged by defendant in retaliation against her refusal to accept her role as a black woman in a white employment society. Her principal crime seems to have been profane and sometimes unsavory conversation. Her conversation, however unpleasant, was in pursuit of a valid right. Her discharge for asserting her rights was more obscene than her language. Ragin is entitled to recover on her claim for discriminatory discharge.

Later the court found:

> Terry Ragin was in fact discharged by the defendant in retaliation against her refusal to accept her role as a black woman in a white employment society. She was discharged for asserting her rights. She is entitled to relief on her claim for discriminatory discharge on October 4, 1977. The reasons set forth in defendant's "documentation" of Ragin's discharge are pretextual rather than valid.

The "documentation" were contemporaneous

memoranda made of various interviews with Terry Ragin and warnings given to her about her conduct. The district court's finding that the memorandum and warnings were pretextual is clearly erroneous. No employer and no group of fellow employees are required to endure the foul language and threats made by this plaintiff. Such a finding by this court does not require a determination of credibility, because Ragin in her testimony admits what she did and this cannot be excused merely as "her refusal to accept her role as a black woman in a white employment society." The record proves that the defendant made every effort to accommodate a very difficult employee and was required finally to separate her to prevent further disruption in the office where she worked.

EVELYN ALEXANDER

Evelyn Alexander, a black female, graduated from high school and attended one year of college. She applied for the data processing technician class when the Hospital hired her in July 1973. She was accepted into the class, but did not get into the orientation class she expected because the employee of the personnel office who was supposed to call her about the class was away from the office because of a death in her family. Although she missed the data processing technician class she was employed as an accounts receivable clerk and did well in this position until she developed problems of absenteeism and tardiness.

The trial judge found that she was denied the data processing technician job

because of her race, was denied a laterial transfer to a vacant job as refund clerk because of her race, and further found:

> Alexander was discharged on April 3, 1978, allegedly because of excessive absences and because she left the Hospital premises on March 31, 1978, and allegedly took more than an hour at lunch without previous permission. There is a background to this. Alexander had filed a charge with the Equal Employment Opportunity Commission on April 21, 1976, alleging that she was denied the refund clerk job (discussed above) because of her race. Twenty days later, the defendant started papering her file with "anecdotals" charging her with absenteeism without determining whether her absences were justified. In fact, the evidence shows that her various absences were justified. The evidence is in conflict on whether plaintiff's absence on March 31 was within the regulations respecting lunch absences; there was no written policy covering the subject. The practice, the rule, whatever it is, was not consistently enforced; employees do leave the Hospital premises at lunch time without obtaining permission and without punching the clock. Employees are at times allowed to combine lunch break with morning and afternoon coffee breaks. The particular absence which brought about plaintiff's downfall was a visit to her insurance agent; her home had been burned a day

> or two previously. Finally, the evidence shows, in fact, that Alexander was gone less than an hour instead of more than an hour. Defendant's offered explanations are prtextual.

Although there is a conflict in the testimony as to how long Alexander was away from the Hospital on March 31, 1978, the district court's findings that the offered explanations were pretextual is clearly erroneous on the record. Mrs. Alexander testified that she went to the insurance agent's office to pay the premium on a policy. The visit did not arise out of the fire which did not occur a day or two before the visit on March 31, 1978, but had occurred in February 1978.

Mrs. Alexander's problems with absenteeism and tardiness began before she filed a claim with the EEOC. In 1975 she missed 202.21 hours, in 1976 she missed

227.5 hours, in 1977 she missed 405.8 hours and until her discharge in April 1978 she had missed 128.1 hours during that calendar year. Her lack of concern for her attendance is clearly indicated in her testimony:

> Q. Back to this conversation with Mr. Moss in what you believe was February or March of 1978, did you assure Mr. Moss that you didn't see any reason that you could not be present at all times from that date forward?
>
> A. I wouldn't tell anybody that.
>
> Q. Did you assure him that you would do your very best to improve your attendance?
>
> A. I'm not sure if I told him that or not.
>
> Q. It's possible you told him that.
>
> A. I doubt it.
>
> Q. So you didn't think your attendance was going to improve at that point.
>
> A. Well, I'm not going to ever put

myself in a situation where I would have to live up to such standards.

Q. I see. You wanted to reserve the option to be late and absent if you felt it was necessary.

A. Not necessarily, but I'm not going to put myself in jeopardy by saying so.

Q. So you could not offer Mr. Moss any guarantee or assurance that things would get better from that point forward.

A. I wouldn't give anybody that guarantee.

Q. And you did not offer any possible solutions to your attendance and tardiness problem; is that right?

A. Did I offer?

Q. Yes, ma'am. Did you offer any possible solution?

A. Such as what?

Q. Such as medical leave of absence, which we've already discussed, anything else like that that you might have suggested that you do?

A. No.

Q. You made no suggestions whatsoever?

A. No.

Beginning in 1975 her supervisors counseled with her about absenteeism and tardiness. They advised her that she was doing a good job but her job required that she be present. The continued absenteeism produced written warnings on March 3, 1977, June 10, 1977, and November 21, 1977. At a meeting in February 1978 with her supervisor and the general manager of the office she agreed to try to be at work every day, but her record of absenteeism continued and at the time of her discharge it was averaging twenty-six percent. These undisputed facts cannot be swept away as pretextual, without evidence to explain or contradict them.

Bertha Anderson, Bertha Chisolm, Ruth Coleman, Lillie Ann Stewart

McCain, Pamela Bennett, Kim Wallace, Lula Miller, and Randy Turner

We have also considered the district court's other factual findings in light of the evidence in the record. Given our standard of review under Rule 52 of the Federal Rules of Civil Procedure, see Anderson, 53 U.S.L.W. at 4317, we cannot say the district court's findings are clearly erroneous.

V

In summary, we reverse the district court's creation of a subclass of those persons discriminated against in hiring and the district court's factual findings concerning three named plaintiffs: Wilma Oliphant, Terry Ragin, and Evelyn Alexander. The decision of the district court in all other respects is affirmed.

Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1438 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLOTTE MEMORIAL HOSPITAL AND
MEDICAL CENTER, ET AL,

Petitioners

v.

WILMA OLIPHANT, ET AL,

SUPPLEMENTAL APPENDIX
TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN O. POLLARD
WHITEFORD S. BLAKENEY
Attorneys for Petitioners
and Counsel of Record
3700 NCNB Plaza
Charlotte, NC 28280
(704) 372-3680

Of Counsel:
BLAKENEY, ALEXANDER & MACHEN
Charlotte, NC

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EDITOR'S NOTE

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lsa

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 83-1772

Wilma Oliphant, et al.

Appellees,

versus

Charlotte Memorial Hospital,
et al,

Appellants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge

---

The appellant's petition for rehearing and the appellees' motion for clarification and petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion

for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied.

IT IS ORDERED that the petitions for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman with the concurrence of Judge Russell and Judge Hall.

For the Court,

/s/ John M. Greacen
CLERK

FILED

NOV 29 1985

U. S. Court of Appeals
Fourth Circuit

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-78-326-M
WILMA OLIPHANT; TERRY RAGIN; BERNICE HOWIE; BERTHA ANDERSON; and RUTH COLEMAN, individually and on behalf of all others similarly situated,
Plaintiffs,

-vs-

CHARLOTTE MEMORIAL HOSPITAL and MEDICAL CENTER; and CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

C-C-78-370-M
CHARLES NORWOOD; LULA B. MILLER; EVELYN ALEXANDER and YVONNE SESSOMS,
Plaintiffs,

-vs-

CHARLOTTE MEMORIAL HOSPITAL and MEDICAL CENTER; and CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY,
Defendants.

J. LeVonne Chambers, Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A. Suite 730 East Independence Plaza, 951 S. Independence Boulevard, Charlotte, NC 28202; and Michael A. Sheely, 418 Law Building, Charlotte, NC 28202, counsel for plaintiffs.

John O. Pollard, Blakeney,Alexander & Machen, 3450 NCNB Plaza, Charlotte, NC 28280, counsel for defendants.

Before, James B.McMillan, District Judge

I.

PRELIMINARY STATEMENT

These cases were tried from October 21 through October 30, 1981. On November 30, 1981, the court issued a nine-page memorandum of decision and order, which appears of record, making findings and conclusions with reference to defendants' patterns and practices of racial discrimination as shown by the evidence in the trial, and findings and conclusions with regard to discrimination -- and lack of it -- as to named plaintiffs and some of the class members. Counsel for plaintiffs were directed to prepare proposed detailed

findings of fact and conclusions of law. Those were forwarded to the court, reviewed by the court, and sent back to plaintiffs with a number of changes for re-drafting. That 97-page re-draft, a voluminous rendering of my original memorandum of decision, is in hand. However, in view of the condemnation in recent cases by the Fourth Circuit Court of Appeals of the use by judges of findings and conclusions prepared by counsel, I have not adopted counsel's work but have, at considerable labor, prepared the following. Because it tries to be faithful to the facts, it smacks heavily of the contents of the original memorandum and of the plaintiffs' offering. It is "an ill favored thing, Sir, but mine own,"[1] -- and I trust it will

---

[1]Touchstone, of Ardrey, W. Shakespeare, As You Like It, Act V., Scene iv., l.60.

be treated as "mine own" by any who read it.

II.

FINDINGS OF FACT

A. Patterns and Practices of Discrimination.

1. Plaintiffs, black employees of and applicants for employment at Charlotte Memorial Hospital, brought these two suits, alleging that defendants had violated their rights and those of proposed class members under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., as amended, and 42 U.S.C. §§1981 and 1983.

2. After due consideration, classes were certified as follows:

In the Oliphant case:

> Plaintiffs, all blacks currently employed by defendant hospital in clerical positions and all blacks employed by defendant at any time since December 6, 1975, in a clerical position who are not currently

employed; all of whom have been or may have been discriminated against in reference to defendants' policies covering promotion, transfer, job placement, termination, discipline, and unfair job performance evaluations on account of their race.

In the Norwood case:

> All black applicants for employment or training with and all black employees of defendant Charlotte Memorial Hospital and Medical Center who, at any time since April 24, 1972, have been denied employment or training opportunities, promotions, transfers, equal wages or who have been denied equal performance evaluations, disciplined or discharged in a discriminatory manner because of their race and color or in retaliation because of their efforts to exercise rights under Title VII. This class includes both professionals and non-professionals.

3. Claims with reference to professionals (physicians, dentists and nurses) were settled before the trial was concluded.

4. Defendant Charlotte-Mecklenburg Hospital Authority is a public corporation chartered by the State of North Carolina.

It owns and operates the Charlotte Memorial Hospital and Medical Center, a complex medical service and training facility.

5. Between 1972 and the date of trial in October, 1981, the Hospital employed approximately 3,500 employees; about 38% or 39% of those have been black. Employees are assigned to approximately fifty divisions and departments in job positions ranging from non-skilled to professional and highly skilled, including staff physicians. Employees are assigned to approximately 450 job codes, approximately sixty of which required registry, certification or licensure.

6. The directors of the medical and dental programs and the director of legal affairs have always been white. The hospital

has a director, a deputy director, and seven associate directors, all of whom have been and are white. One black served as an assistant to an associate director during 1978. No black has ever served as manager of any of the fifty departments. Blacks have held some assistant managerial positions and some supervisory positions in nursing, pharmacy, environmental services and laundry.

7. In 1979, eighteen of the fifty departments had no black employees. About 70% of the black employees in 1979 were in nursing, environmental services, dietary or food handling, laundry and central services. In those departments their roles were those of licensed practical nurses, nurses' aides, janitors, cleaners, cafeteria workers and laborers. By race, those

departments in 1975 and 1979 were composed as follows:

	1975		1979	
	White	Black	White	Black
Nursing	1135	596	1082	495
Environmental Services	33	146	23	174
Dietary	88	226	67	159
Laundry	3	52	5	54
Central Services	16	70	5	50

Black employees have been concentrated in low paying jobs. Wage differentials ranged from about 29¢ per hour in 1975 to a high of 64¢ per hour in 1978 between black and white employees, with comparatively equal or similar education, length of service, departmental assignment and work schedules. Supervisory staffs in majority black departments were mostly white. Black supervisors were often not accorded equal status and supervisory

duties with white supervisors, and in environmental services the uniforms of black and white supervisors were different.

8. Blacks as a rule were initially employed into the lowest paying jobs, especially janitorial and food handling work, and tended to remain in such work.

9. Discriminatory hiring, promotion and transfer policies were followed, as evidenced by:

(1) Notices of vacancies were not posted at all until late 1978, at which time posting in the personnel office only was begun. It was not until mid-1979 or later that posting in the rest of the hospital was done on any regular basis.

(2) Employees were not advised of forthcoming job vacancies, even in their own departments, unless they had been chosen as candidates for a vacancy.

(3) Persons selected by management for promotion or transfer were individually and privately consulted

before the vacancy was announced or created.

(4) In the personnel office, lists of vacancies were kept secret from the public and from applicants, and interviewers were close-mouthed with information about vacancies until they had determined what particular vacancy a particular visitor was interested in.

(5) Hiring, promotion and discharge policies were not complete nor up to date, and they were not kept in a book nor in any one place where they could be found and regularly consulted, even by personnel officers.

(6) No written criteria were available to interviewers and selection officers to guide even the interviewers and selection offers in choosing among applicants. Decisions to employ were based upon substantially unguided, subjective personal opinions and judgments.

(7) One black was told that a job would require a college degree; without notice to her, the college degree requirement was suspended and

a white person without a college degree was hired.

(8) Training programs were started without opportunity for blacks to apply and participate.

(9) White people of choice were selected and alerted and trained to fill openings before blacks knew about the vacancies or were given an opportunity to bid on them.

(10) Subjective judgments of supervisors or interviewing officers were all too frequently exercised in favor of white applicants, for promotion, for training, for transfer, or advancement.

(11) Blacks were denied lateral transfers while whites were permitted them.

(12) Blacks were subjected to arbitrary and inconsistent time periods they had to remain in a job before promotion or transfer.

(13) College education, irrelevant to the requirements or needs of a job, was sometimes required. Blacks who don't have as many college degrees as whites, were prejudiced by this requirement.

(14) Unofficial policy was that

blacks had to do well in their original job before any transfer was allowed.

(15) Written requests for promotion or transfer were not required of whites. Blacks' requests for promotion or transfer were ignored or disregarded because not in writing.

9. Retaliation against blacks who aggressively or persistently sought employment or advancement was carried out in the form of:

(1) Critical fitness reports and "anecdotals" for blacks who pushed for promotion.

(2) Critical notations in personnel files of blacks who filed charges with the Equal Employment Opportunity Commission.

(3) Pressure upon blacks in the form of heavier criticism of work and bad marks on fitness reports and discriminatory criticism or discharge of blacks for tardiness or absenteeism.

(4) The "documentation" of records which would provide the basis

for ultimate discharge and, when necessary, for denial of promotion or other job opportunities for blacks who had had the temerity to challenge or sue the hospital.

B. Discrimination with regard to Named Plaintiffs and Class Members.

10. Pamela Bennett, a member of the class, is black. She started work in October, 1970, as a file clerk in the personnel department. In June, 1972, she became a personnel secretary; in the summer of 1974, an accounts payable clerk in the accounting department; and in the fall of 1978, a maintenance accountant in the maintenance department.

In September, 1981, her job in maintenance was phased out, and she applied for transfer to a job as patients' accounts officer in the business office handling patients' accounts. She heard

the position was open; asked the supervisor, Ms. Dollinger, for the job; was interviewed; but was not hired. She was told that Bob Kenan, a white male, had already been interviewed from the outside. The job consisted of checking up on how patients would pay their hospital bills. Bennett, because of her experience as accounts payable clerk and in other capacities, was better qualified than Kenan. She was denied the job because of her race. Defendants did not "articulate" any other reason.

Bennett also claims that, when Johnny Flowers resigned in March of 1981, she was denied Flowers' job as administrative assistant in the maintenance department. That job consisted of receiving orders from the maintenance people for needed

supplies and equipment, and following up orders placed with vendors of equipment. Bennett was experienced in this work and capable of doing it, and had in fact performed the job for several weeks in March and April of 1981 after Johnny Flowers had departed. She did not make application for Flowers' job, but that is of no special sig..ificance because (1) Mr. Culp, the director of maintenance, had asked her before Flowers left if she thought that a person with eleven years' experience in sales could handle the job, and she replied "Yes, anybody could," and (2) Culp testified that he in fact considered Bennett for the job, but passed her up in favor of Ledbetter. From this exchange, she testified, she knew that somebody had already been selected and

that there was no need to apply. She, in fact, trained Pat Ledbetter, the white woman who was hired from outside the hospital, for the job. (Ledbetter's experience had been dealing with purchasing agents rather than selling agents.) Bennett was denied the administrative assistant job because of her race. The defendants' explanation (that the director was looking for someone who was "self initiating" who would "take the position and develop it") are not taken at face value by the court and are deemed pretextual. It is of further interest that only white employees have been promoted in that department since Mr. Culp became its department head in 1979.

Bennett is entitled to appropriate relief based upon her denial of appointment

to both of the two jobs mentioned above.

11. Ruth Coleman, a named plaintiff, was first employed by the defendant in July, 1975, as a CETA (Comprehensive Employment Training Act) employee. She was a high school graduate with a certificate in office procedure and key punch operation from Central Piedmont Community College. She is also a typist. She had had three years' experience as a clerk in the United States Post Office and a year or so of experience in each of three other jobs (as a receptionist for Planned Parenthood, as a consultant for the Street Academy and as an office clerk for an employment agency). The original CETA funding was for one year. Coleman's first post, starting in July of 1975, was that of medical records clerk. In August

of 1975 she was transferred to be an accounts receivable clerk in the business office, correcting computer errors, posting payments, answering the telephone and correcting errors in patients' accounts. She worked until September, 1976, when she left because she had been denied transfer or promotion to a regular job. Between February and June, 1976, she made several requests for transfer to a permanent job and those requests were denied. She was given various reasons: that her hourly rate in the temporary job was higher than she might get in the regular job; that a supervisor placed employees "where he wanted to place them"; that she ought to be satisfied with $3.10 an hour.

When she started requesting a

permanent job, she was put under closer observation; she was given a below average rating instead of previous good ratings and was told that the CETA job could not be renewed. Her goings and comings within the hospital area were more closely supervised, especially after she filed a charge of employment discrimination with the Equal Employment Opportunity Commission in June of 1976. The elimination of the CETA job was at the request of the hospital, not of the government. Plaintiff Coleman's CETA job, in fact, was extended on September 22, 1976, for a period until January 31, 1977, but she was told by her supervisor that her employment was not being extended.

Several white employees were hired from the outside into permanent jobs after

plaintiff Coleman first started seeking a permanent job. Coleman's experience and qualifications were superior to those of the persons hired. In fact, the plaintiff was asked to show one of those persons how to do the job. Coleman's final rating, even at the time of her termination was, in fact, acceptable.

I find as facts that because of her race, plaintiff Coleman (a) was denied transfer to a permanent job; (b) was pressured out of the job by the manipulation of the CETA funding request; and (c) was harassed on the job after she filed a claim with the Equal Employment Opportunity Commission. The defendants' explanations to the contrary are pretextual. Plaintiff Coleman is entitled to appropriate relief.

12. Wilma Oliphant, a named plaintiff, was employed on August 23, 1976, as an audit and cost clerk in the business office. She was a high school graduate with two years of business courses from Central Piedmont Community College. These courses included clerical work, typing, handling office machines, business communications and filing. She had worked as a proof operator, encoding checks, at NCNB. Her job as an audit and cost clerk required allocating Medicare and Medicaid payments to the patients' vouchers or log sheets for purpose of being punched into computers. She also did filing.

From her first interview she was sexually harassed by her supervisor, Hartsell Sweatt. She was the only black employee in a group of six or seven

supervised by Sweatt. She requested transfer to other jobs to get away from Sweatt, but was not allowed transfer to any job she was then qualified for. After she complained about Sweatt and Sweatt was reprimanded, Sweatt put her under closer supervision, observing her actions and becoming more critical. It reached a climax when Sweatt instructed her to change an entry she had made on a patient's account; she told him that the record was correct and should not be changed and Sweatt fired her on the spot.

At least two white female employees complained to the supervisor about Sweatt's sexual advances. They were not, however, subjected to harassment or denial of employment opportunities nor discharge; Oliphant was the only one who received that

sort of treatment.

Oliphant's discharge on August 2,1977, was based on racial discrimination. Defendant's claim that she was discharged for putting the wrong code number on a form is pretextual. She was discharged because of her complaints to management and to the EEOC, about Sweatt and about the hospital's racial practices, and for her request for other jobs in order to avoid contact with Sweatt. Defendant's explanations, including the handling of "anecdotals," are pretextual.

I do not find that Oliphant was denied any promotion or transfer for racial reasons.

13. Terry Ragin is young, serious, brash, assertive and credible. She is a high school graduate who had two years of

college, including accounting, typing (seventy words per minute), and bookkeeping, and she had had four years of clerical experience when she was employed in February, 1976, as a collection officer in the business department. She was the only black employee in that position. She complained openly about racial prejudice and got in trouble with her supervisor, Sullivan, and fellow employees, and she got in more trouble when she started asking for a better job. Her complaints about use of the term "nigger" were brushed off by her supervisor as being too sensitive. After a number of unsuccessful requests for assignment to a more challenging job, she filed a complaint with the Equal Employment Opportunity Commission in August of 1977. This

produced an increasing number of incidents in which she reacted, sometimes strenuously, to pressure from management and fellow employees. She was denied transfer to four different jobs which she was qualified to fill between March and September, 1977. However, since she withdrew some of the requests and the record is not clear that she was requesting those jobs at the time the vacancies occurred, no relief is afforded for discriminatory refusal to promote or transfer.

A very "proper" list of "anecdotals" was written up and culminated in a well "documented" discharge on October 4, 1977. Terry Ragin was in fact discharged by defendant in retaliation against her refusal to accept her role as a black woman in a white employment society. She

was discharged for asserting her rights. She is entitled to relief on her claim for her discriminatory discharge on October 4, 1977. The reasons set out in the defendants' "documentation" of Ragin's discharge are pretextual rather than valid.

14. Bernice Howie worked at Charlotte Memorial Hospital from March 25, 1975, until August 19, 1977, as an insurance clerk. She made claims at the trial for several jobs which she said she was denied because of her race. She resigned August 8, 1977, without having asserted any claim of racial discrimination. Her claim is also complicated by the fact that she was on maternity leave for three months during which some of the jobs involved came open. I am not persuaded that she was denied any job opportunity on account of

her race.

15. Plaintiff Bertha Anderson was employed by the hospital in September 1977. She was initially assigned as a Clerk I in medical records. She is a high school graduate with additional clerical courses and clerical experience and seven or eight years of experience as a waitress. (Trial transcript, pp. 250-253.)

Anderson requested (a) a transfer to Clerk I and (b) transfer to Patient Representative. Both requests were in December, 1977. (Trial transcript, p. 243.) She was denied both jobs and contends that her rejection was racially motivated.

(a) The Clerk I position requested by Anderson, which was assigned to a newly hired white employee, would have been a lateral transfer with no increase in pay.

The job duties involved answering the telephone and giving out information about medical records to appropriate individuals. (Trial Transcript, pp. 864, 868.) The job required no specific educational training. It was an entry level position and the person assigned to the job would have to be trained. Anderson had more educational and work experience at the hospital than the person selected for the position. Anderson was more qualified for the job.

Defendants contended that lateral transfers were prohibited, that they did not have time to consider Anderson and that her conduct was unacceptable. Defendants' ban against lateral transfers has been applied disproportionately to black employees. White employees have been transferred laterally. No black

employee, however, has been allowed to do so. (Plaintiffs' Exhibit 18.) Anderson was qualified to fill the position and the job would have provided her with additional experience which would have improved her opportunities for advancement. Defendants' "no transfer" explanation is pretextual.

The other two reasons advanced by defendants for not transferring Anderson are also pretextual. Anderson was present at the hospital and working in the department where the vacancy existed. She was available for consideration if defendants wanted to consider her. The person selected did not work at the hospital and presumably had to be brought in for interviews. Additionally, no credible evidence established anything about Anderson's conduct which would disqualify her for the

position. Defendants' reasons for not transferring Anderson do not withstand scrutiny.

(b) The transfer to patient representative. Between 1975 and 1979, only one black employee was employed by defendants as a patient representative. The twenty-five other representatives are white. Patient representatives acted as liaison between the hospital and patients and their families and assisted patients with non-medical problems that developed during their hospital stay. The job required a high school education, and some "people oriented" experience was preferred. (Plaintiffs' Exhibits 63 and 122; Trial Transcript, p. 1018.)

Defendants first contended that all of the patient representative positions

had been filled at the time Anderson applied. They later contended that Anderson did not have sufficient "people oriented" experience. Neither explanation will hold water.

Anderson applied for a patient representative position on December 7, 1977. At least four white employees applied and were selected for the position after Anderson's application. Defendants' witness finally admitted at trial after being confronted with hospital records showing that applicants applied and were hired for the position after Anderson's application, that "When Ms. Anderson applied, all the jobs had not been filled." (Trial Transcript, p. 1015.)

The witness then suggested that "the real reason [was] that she wasn't qualified."

(Trial Transcript, p. 1014.) (Plaintiffs' Exhibits 63-64, 66-67.) Defendants' witness Dobbins defined "people oriented" experience as "Anything where they [applicants] dealt with the public--social workers, some kind of volunteer work." (Trial Transcript, p. 1008.) Anderson had seven or eight years of experience as a waitress. Defendants admitted that this was "people oriented" experience but suggested that this was not the type of experience they desired. White persons had been hired, however, with less "people oriented" experience than Anderson. For example, Kathleen Harris, a high school graduate (GED) whose "people oriented" work was volunteer work in a nursing home and in a political campaign, was hired as patient representative on January 8,

1978. (Plaintiffs' Exhibit 69.) In light of all of the evidence, including the limited number of black employees hired for the patient representative position, the fact that other black employees have applied unsuccessfully, the subjective criteria applied by the all-white supervisory staff, the discrimination against black employees as shown by other findings herein, and the demeanor of the witnesses, defendants' explanations for not selecting Anderson for the patient representative position are found to be pretextual.

Anderson also contends that she was discriminatorily denied a Clerk II position to which a white employee was assigned in 1978. She refused, however, to be interviewed for the position and voluntarily resigned in March, 1978.

Anderson was not certain of the date of the assignment, nor whether it occurred after Anderson resigned, and she admitted that she had refused to be interviewed for the job. She offered no evidence that she was forced out of her job. The court finds that she was not discriminatorily denied the Clerk II position and was not forced to terminate her employment with the hospital. Anderson is entitled to relief, however, for being denied transfer to the Clerk I position and to the patient representative job.

16. Class member Kim Wallace is an intelligent and credible claimant and witness. She graduated from high school at an Army base in England and came to Charlotte Memorial Hospital as a Clerk I in the personnel department in January,

1976. She promoted to Clerk II in 1978. Her experience in England had not prepared her to accept an inferior racial "place" or status. (Trial Transcript, pp. 268-269.)

Wallace complained about her inability to transfer to the wage and salary specialist job which was created during the summer of 1977. The salary specialist was expected to study and compare the job duties and wage scales of job positions at the hospital with similar jobs at other establishments, and to make recommendations for salaries and wages for the various jobs at the hospital. The position was initially advertised as requiring a college degree. The hospital was unable to attract college graduates for the position because of its projected low

salary. The personnel manager then eliminated the college degree settlement without notice to Wallace, and selected a white employee, Linda Nichols, who was junior in service to Wallace, and trained Nichols for the job.

Wallace requested the position when it was first advertised and was advised that a college degree was required. Wallace was not advised, however, when the college degree requirement was eliminated. Wallace had one year more of work experience in personnel than Nichols. Wallace had as much educational training and could have been as easily trained as Nichols. With the modification in the job description and requirements, no special skills were required. The employee was simply to make inquiries of supervisors and others about

particular job duties and pay and was then to work closely with the personnel manager in developing comparisons. Wallace was more qualified for the position than Nichols.

Defendants contended that Nichols had worked at least four or five months with employee benefits while Wallace worked as a clerk and receptionist. Wallace's duties, however, required that she provide new applicants with information about job vacancies, their duties and pay. As receptionist, Wallace was provided a list of job vacancies and would use that list to advise applicants if vacancies existed in job positions they were seeking. As clerk, she was responsible for maintaining the active and inactive files and the orientation packet for new employees, and

other clerical duties. (Trial Transcript, pp. 274-276, 281-282, 1053-1054.)

Viewing the entire record and the decorum of the witnesses, the court finds that defendants' explanations for not selecting Wallace for the position are pretextual. The job duties performed by Nichols simply required checking whether an individual was on the hospital payroll for insurance coverage, passing out and receiving evaluation forms on employees from supervisors, and indicating to payroll personnel that particular employees were entitled to wage increases as determined by their supervisors. Defendants suggest that more was involved and that because of her job duties, the person selected became familiar with the wage scales which were to be studied. (Trial Transcript, pp.

1038-1039, 1053.) However, the credible evidence establishes that the limited experience of the employee selected and the work she actually performed provided her with no greater background than Wallace to perform or to be trained for the newly created position. The employee was to be trained for the new position, however, and because of her longer relevant experience with the hospital, Wallace was more qualified than the person selected. She is accordingly entitled to relief for being denied the position.

Wallace voluntarily terminated her employment in August, 1978. She does not claim and offered no evidence that she was forced to leave. The court finds that she is not entitled to relief in connection with her resignation.

17. Lillie Ann Stewart McCain worked for Charlotte Memorial Hospital starting in September of 1960 as a nurse's assistant. She had successfully completed two years of college. She made a number of efforts to get into better work in 1961, 1965, and 1971, among other times. In the times relevant to this case she makes three claims:

> (a) Denial of transfer to data processing technician in 1977. She was denied upon the ad hoc basis that nurses' assistants could not transfer into data processing. I am not persuaded she is entitled to that job, because it did actually require certain clerical skills which she did not show she had.
>
> (b) In July, 1977, she applied for and was denied the job of surgical technician trainee. She was accepted for the training class, was hospitalized for nine days (ending five days before the class began), and then was told she had been sick too much and could not enter the class. She was denied

the surgical technician training job because of her race. Defendants' reasons to the contrary are pretextual.

(c) In November, 1977, Ms. McCain was discharged, allegedly for refusal to bathe a patient. Her discharge was retaliatory and discriminatory. She was fired without a hearing for allegedly refusing to bathe the patient, despite the facts that her supervisor had instructed her to give the patient only a partial bath and that the patient's wife, in fact, voluntarily provided whatever bath was provided while plaintiff was taking care of a more urgent errand with another patient. Defendants' alleged reasons for the discharge are pretextual and are not credited by the court. There was not even a credible "articulation" of a valid, non-racial reason for discharge.

18. Plaintiff Evelyn Alexander was first employed by defendants in July, 1973. She is a high school graduate with a year of college and extensive clerical and accounting experience. Her training and experience qualified her for a job as data processing technician. She applied for and

was promised a job of data processing technician, but was initially assigned Clerk III. She continued to seek the data processing technician position without success. A supervisor claimed that her attendance record disqualified her for promotion. That excuse is pretextual. Her absences were for legitimate reasons; no one told her she was denied the job because of attendance; and some supervisors said they did not even know she wanted to be promoted. She was denied the data processing technician job because of her race.

In 1976 she sought a lateral transfer to a vacant job as refund clerk. Defendants filled the job instead with a newly hired white woman, Regina Jennings, who had less clerical experience and was not shown to

have more college training than Alexander. Jennings left the job after a few months, and defendants assigned a CETA employee, Marla Dykes, to the job. Again, the defendants' reliance upon bad attendance to justify the denial of this opportunity to Alexander is pretextual. Plaintiff Alexander was denied the refund clerk job because of her race.

Alexander was discharged on April 3, 1978, allegedly because of excessive absences and because she left the hospital premises on March 31, 1978, and allegedly took more than an hour at lunch without previous permission. There was a background to this. Alexander had filed a charge with the Equal Employment Opportunity Commission on April 21, 1976, alleging that she was denied the refund clerk job (discussed

above) because of her race. Twenty days later, defendants started papering her file with "anecdotals" charging her with absenteeism without determining whether her absences were justified. In fact, the evidence shows that her various absences were justified. The evidence is in conflict on whether plaintiff's absence on March 31, 1978, was within regulations respecting lunch absences; there was no written policy covering the subject. In practice, the rule, whatever it is, was not consistently enforced; employees do leave the hospital premises at lunch time without obtaining permission and without punching the clock. Employees are at times allowed to combine lunch break with morning and afternoon coffee breaks. The particular absence which

brought about plaintiff's downfall was a visit to see her insurance agent; her home had been burned a day or two previously. Finally, the evidence shows, in fact, that Alexander was gone less than an hour instead of more than an hour. Defendants' offered explanations are pretextual.

19. Randy Tucker is a high school graduate with one year of college. His employment period was from March, 1971, until sometime in 1975. In 1973 he applied for transfer to a job as respiratory therapist, but did not get the position. Later, the training program for respiratory therapist was transferred to Central Piedmont Community College. Tucker filed a claim on this incident with the Equal Employment Opportunity Commission in 1973 or 1974. Later he was

discharged. Tucker is a class member, and the merits of his claim for discriminatory denial of transfer will be decided in Stage II proceedings.

20. Plaintiff Lula Bell Miller is a high school graduate and a trained practical nurse, but not a licensed nurse. At various times beginning in 1973 she sought jobs as a nurse, technician, nurse's assistant, file clerk or receptionist, all positions for which she was qualified. In 1973 she was advised by the defendants that she would be accepted for a job as nurse's assistant. However, when the defendants learned that she had filed a charge with the Equal Employment Opportunity Commission against a former employer, Presbyterian Hospital, and had received a favorable determination from

the EEOC, defendants withdrew their offer of employment. She continued to make application for employment.

The record of plaintiff's employment and claim at Presbyterian Hospital was not presented to the court. Defendants advised that they could find no record that she had applied for jobs at Memorial Hospital. The evidence does not show the nature of her qualifications compared with those who got the jobs for which she applied. Her claim should be dealt with on a more complete record in the Stage II proceedings.

21. Bertha Chisholm is a college graduate and a licensed medical technologist. She started work with defendants as a laboratory intern in 1971 and got a permanent job as medical

technician in 1972. Her performance ratings have been consistently high. In 1980 she applied for a job as assistant supervisor in her department. Defendants selected instead Lynn Springs, a white employee with only two years of experience. Springs had been selected for the job before the vacancy was announced. Also, before the vacancy was announced she was assigned some of the duties of the new job so that she could learn how to do the job.

Defendants attempted to explain their selection by saying they chose Springs because they needed a "motivator"; nobody had complained about Chisholm not being a "motivator" and she had, in fact, been given additional duties because she had done a good job. Defendants also asserted

that Springs fit the job "criteria" better than Chisholm. This explanation will not hold water, because the "criteria" were made up after the choice between Chisholm and Springs had been made. Chisholm had seven more years of work experience in the laboratory than Springs. Defendants' explanations are not credited and are pretextual. The post-decision performance review of Chisholm is not entitled to any weight because it was made up after the fact in order to support the decision. It is pretextual. Chisholm is entitled to be compensated for her loss of wages, and promoted to the original Springs job, and to any job to which that appointment might have led.

C. Brief Summary of Findings of Fact

22. In the various ways set out in the foregoing findings of fact, the defendants did unlawfully discriminate against the individuals named. They are entitled to relief from the results of that discrimination.

23. As support for the conclusions previously set forth, plaintiffs offered statistical evidence and opinions of statistical experts. Though not necessary to the formulation of the findings already recorded, plaintiffs' statistical evidence does support those findings. Defendants' statistical analyses and testimony do not refute the plaintiffs' statistical showing.

24. Specifically, the statistics demonstrated to the satisfaction of the court that:

(a) In job assignments, blacks are subjected to a disproportionately large number of lower paying job positions. This seems to be true even in the case of black employees with superior experience and qualifications. The plaintiffs' samples are adequate and fairly representative for the periods covered. and the data supporting the analyses is not seriously challenged. Defendants have not shown evidence from which it could fairly be concluded that superior experience, training and capabilities of white employees accounts for the differential assignments and the differential wages.

(b) On account of their race blacks sustained far more involuntary terminations or discharges per capita than whites in the period 1975-1979.

(c) Although several individual plaintiffs proved that they were denied promotions or transfers on account of race, the plaintiffs have not demonstrated by statistics or otherwise that in the realm of promotions as such, blacks as a class were treated in a discriminatory fashion.

25. The disparities in employment

opportunities for blacks in the form of assignments to lower paying jobs and in involuntary terminations are the result of the practices and policies which are described in the evidence and which are summarized in findings of fact 6 through 9 and in the particular findings with regard to the particular named plaintiffs.

26. In various ways, as found above, retaliation was carried out against black employees who pushed for equality or complained to outside authorities.

27. Timely charges were filed by plaintiffs Oliphant, Ragin, Howie, Anderson, Coleman, Norwood and Alexander, and by intervenors McCain and Chisholm. All received "right to sue" letters and instituted these proceedings within appropriate time limitations.

Although Norwood did not testify and is not an appropriate class representative, others relying upon his charge have appeared and testified and offered evidence, and the other named plaintiffs and intervenors are appropriate representatives and will fairly and adequately protect the interests of the class. They are represented by thoroughly competent counsel, experienced in employment discrimination cases.

CONCLUSIONS OF LAW

28. The court has jurisdiction of the suit and of the parties under the statutes above cited. The charges were timely filed and the parties are properly in court.

29. The original class certifications are modified and consolidated in light of the evidence and the findings of fact, so that the final class is hereby defined and

certified to be:

> All black employees of defendants who have worked in or have sought or have been assigned to non-professional job positions (technical, skilled, semi-skilled and labor) who, at any time since October 13, 1973, have been discriminatorily denied a job, or discriminatorily assigned to a job, or discriminatorily denied transfer to a job, or discriminatorily discharged or subjected to retaliatory treatment or actions, because of race or color.

30. Black employees, including several of the plaintiffs, have been on account of their race assigned to lower paying positions. This was a racially discriminatory policy and action. Defendants have not rebutted that showing.

31. Plaintiffs have failed to establish entitlement to class relief based upon disparities in promotion practices, although several plaintiffs and class members did demonstrate specific discrim-

ination, as to them individually, in the area of promotion. Relief will be awarded to some individuals, but no class relief will be ordered for discriminatory failure to promote.

32. Blacks as a group because of their race have been disproportionately disciplined and discharged, and subjected to retaliation for asserting their rights.

33. The plaintiffs have the burden, and have had the burden throughout, of persuading the court as to every fact material to recovery for every individual and every claim, and for a class, and as to each particular form of discrimination.

34. Defendants have not had any burden of proving anything at any time. Defendants have had the opportunity to offer evidence and otherwise to rebut any

showing plaintiffs may have made. As indicated above, in all the particulars necessary to support the findings which have been made in favor of relief for plaintiffs, the plaintiffs have carried the burden of demonstrating that they were entitled to recover, and that defendants' explanations, when offered, for discrimination were pretextual rather than legitimate. The court has heard the witnesses, and these findings are, of course, based upon the accepted methods of weighing testimony, including observation of witnesses and making judgments as to credibility.

35. Each plaintiff in whose favor facts have been found is entitled to the relief indicated above and to such relief as may be provided in Stage II

proceedings.

36. Plaintiffs are entitled to remedial orders, including orders prohibiting defendants from discriminating against black employees in job assignments, compensation, training, transfers, promotions and discharges, and from retaliating against black employees who complain of racial discrimination or seek to enforce their rights under the law.

37. An appropriate judgment will be entered.

This 20th day of June, 1983.

/s/ James B. McMillan
James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-78-326-M)
WILMA OLIPHANT; TERRY RAGIN;)
BERNICE HOWIE; BERTHA)
ANDERSON; and RUTH COLEMAN,)
individually and on behalf)
of all others similarly)
situated,)
Plaintiffs,)
)
-vs-)
)
CHARLOTTE MEMORIAL HOSPITAL)
and MEDICAL CENTER; and)
CHARLOTTE-MECKLENBURG)
HOSPITAL AUTHORITY,)
Defendants.)

JUDGMENT

C-C-78-370-M)
CHARLES NORWOOD; LULA B.)
MILLER; EVELYN ALEXANDER)
and YVONNE SESSOMS,)
Plaintiffs,)
-vs-)
CHARLOTTE MEMORIAL HOSPITAL)
and MEDICAL CENTER; and)
CHARLOTTE-MECKLENBURG)
HOSPITAL AUTHORITY,)
)
Defendants.)

Pursuant to findings of fact and conclusions of law being entered contemporaneously, IT IS ORDERED, ADJUDGED AND DECREED that:

1. This proceeding is certified as a class action under Rule 23 of the Federal Rules of Civil Procedure. The class as finally determined and hereby certified is:

> All black employees of defendants who have worked in or have sought or have been assigned to non-professional job positions (technical, skilled, semi-skilled and labor) who, at any time since October 13, 1973, have been discriminatorily denied a job; or discriminatorily assigned to a job, or discriminatorily denied transfer to a job, or discriminatorily discharged or subjected to retaliatory treatment or actions, because of race or color.

2. The defendants and all persons in concert or participation with them are enjoined and restrained from discriminating against plaintiffs and members of the class

herein defined on the basis of race in initial or later job assignments, transfers and discharges and training, and from retaliating against plaintiffs and class members who challenge or seek to enforce their rights to equal employment opportunity under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.

3. Defendants shall within ten days from the entry of this judgment, or as soon as vacancies develop, reinstate or offer reinstatement, promotion or employment (into the jobs denied them or comparable jobs) to the following persons, who have demonstrated that for racial reasons they were wrongfully denied employment as follows:

> Pamela Bennett was denied transfer in September, 1981, to the job as patients' account officer in the business office, and in March, 1981, to the

job of administrative assistant in the maintenance office.

Ruth Coleman was denied the permanent job she sought at the time of her termination at the end of September, 1976.

Wilma Oliphant was wrongfully discharged on August 2, 1977.

Terry Ragin was discharged on October 4, 1977 on account of her race.

Bertha Anderson in December, 1977, was denied a lateral transfer to Clerk I and a job as patient representative.

Kim Wallace was denied transfer in the summer of 1977 to the newly created wage and salary specialist job.

Lillie Ann Stewart McCain was denied the job of surgical technician trainee in July, 1977, and was discharged in November, 1977.

Evelyn Alexander (a) was denied a data processing job which had been promised upon initial employment; (b) was denied a transfer to a vacant job as refund clerk in 1976; and (c) was discharged on April 3, 1978.

Bertha Chisholm was denied appointment as assistant supervisor in the laboratory in 1980, her entitlement to begin with the date when Lynn Springs actually became assistant supervisor.

4. If the parties are unable to agree within thirty (30) days from the date of this judgment on the job positions which the above-named individuals should be offered, or to which they are entitled under this judgment to be promoted or assigned, those issues shall be referred to the special master by separate order for appropriate recommendations.

5. Defendants shall pay back pay to all the individuals named in paragraph 3 above, for any loss of pay they have sustained because of the employment practices found herein to have been unlawful. Their loss of pay shall be based on the differences in their earnings from the dates of defendants' discriminatory practices but no earlier than October 13, 1973, until these plaintiffs and class members have been reinstated, offered

appropriate employment or promotion or transfer, or assigned to job positions as herein provided. The amounts awarded shall represent the difference between what they would have earned had they not been discriminated against and what they have earned or should have earned through reasonable diligence. They shall also be awarded front pay until they have been placed in the job positions as directed herein. The amount of back or front pay to be awarded to these plaintiffs and class members shall be referred to the special master for recommendations.

6. The claims of Randy Tucker and Lula Belle Miller, and any other class members whose claims are not specifically decided in this judgment, will be referred to the special master for recommendations.

7. Members of the class who have been discriminatorily treated in any of the ways described in the class certification are entitled to relief. They shall be reinstated in employment, promoted or transferred or employed where appropriate and assigned to the job positions they would now occupy but for defendants' discrimination and shall be awarded any loss of earnings they have suffered as a result of defendants' racially discriminatory practices.

8. In proceedings before the master, class members found entitled to recover may be awarded back pay, starting not earlier than October 13, 1973, until they have been placed in the job positions they would now occupy had they not been subjected to defendants' racially discriminatory employ-

ment practices. The special master shall receive evidence from the interested parties and, based on the instructions which will be given in a separate order, shall make proposed findings and recommendations with respect to any injunctive relief and the amount of back pay each class member shall receive. The master shall receive evidence and make recommendations regarding any front pay that should be awarded to class members.

9. Plaintiffs and members of the class are awarded adjustments in fringe benefits to reflect what the fringe benefits would have been in the absence of defendants' discriminatory practices. They shall also be awarded interest from the date of the discrimintory acts of the defendants calculated at the "adjusted prime rate"

used by the Internal Revenue Service in cases of income tax refunds or penalties compounded monthly. The master shall receive evidence from the interested parties and, based on the court's instructions, shall make proposed findings and recommendations with respect to any adjustments in fringe benefits and the interest that should be awarded to plaintiffs and individual class members.

10. Within six (6) months from the date of this judgment, defendants shall also take the following steps to eliminate the remaining effects of their discriminatory employment practices:

Defendants shall:

(a) Post notices of all non-professional openings at the hospital, as well as openings in entry level professional and supervisory positions. Employees are to be given three

business days to bid on such vacancies. The notice must contain a brief description of the job, duties of the job, pay rate, and the name of the person to whom the employee is to submit his or her bid. The hospital is to maintain a list of employees who submit bids. This list is to be used as a source of filling future vacancies.

(b) Canvass the class members herein described and determine if they are interested in and are qualified for professional, technical, para-professional, skilled management, and supervisory positions. This canvassing is only to use education, license and registration requirements, length of service, job performance and other job related criteria to determine if black employees are qualified. A list of names of those qualified shall be maintained, and updated once every six months during the period the court retains jurisdiction of this action. Interested class members who are not qualified for job positions in which they express an interest shall be informed in writing and shall be advised what they need to do in order to qualify.

(c) Establish job descriptions for all professional, technical, clerical, skilled and semi-skilled job positions

of the hospital and establish objective, job related criteria for the selection of candidates for the positions.

(d) Establish job related criteria for the evaluation of job performances of all non-professional employees.

11. Within six (6) months from the date of this judgment, defendants shall provide plaintiffs' counsel with the following reports:

(a) The number of white and black employees assigned to each job and department or division of the hospital;

(b) The name of each class member who has been promoted or transferred since the date of this judgment, the job position and rate of pay of the position to which the class member was transferred and his or her previous job position and rate of pay;

(c) The name of each class member whose request for promotion or transfer was denied and the reason or reasons for the denial;

(d) The name of each class member who has been involuntarily discharged

since the date of this judgment, the date of the discharge and the reason or reasons therefor (defendants shall retain records of each class member who has been involuntarily discharged);

(e) The name of each class member who has expressed an interest in job positions listed in paragraph 12 above, the job position requested and whether that person has been included in the list of employees who are to be considered for future vacancies; and

(f) The name of each class member who has expressed an interest in the job positions listed in paragraph 12 who has been determined by defendants to be unqualified and the reason or reasons for the determination.

Defendants shall provide plaintiffs' counsel with additional reports covering the above subjects every twelve (12) months thereafter during the court's retention of jurisdiction of this action.

12. Defendants shall file a report with the court within forty-five (45) days from the date of this judgment, and shall

serve copies of the report on plaintiffs' counsel, certifying defendants' compliance with paragraph 3 of this judgment and shall indicate the job positions offered to or to which the plaintiffs and class members listed in that paragraph have been assigned or promoted, together with the date of the offer or assignment. If a plaintiff or class member rejects the offer, defendants shall indicate the date of the rejection.

13. Defendants shall designate an individual who will be responsible for preparing and submitting the reports provided for in this judgment and for insuring compliance by defendants with all other provisions herein. The name, job title, and address of the person designated shall be provided to plaintiffs' counsel within thirty (30) days from the date of this

judgment.

14. Plaintiffs are the prevailing parties in this action. The defendants shall pay plaintiffs' reasonable attorney fees, costs and expenses, including expert witness and consultation fees, paralegal time and unusual clerical time for all work performed in this proceeding until the date of this judgment in accordance with an order to be entered regarding fees and expenses.

15. Plaintiffs' counsel shall also receive reasonable attorney fees, costs and expenses, including paralegal time and other proper expenses, for all future work done on behalf of the plaintiffs and class members for all proceedings before the special master and for work done in the implementation of this judgment, including

fees and expenses for monitoring and examining the various reports required, in answering questions of class members and in investigating any alleged violations of this judgment.

16. The action as to Bernice Howie is dismissed with prejudice. Bertha Anderson's claims that she was denied a Clerk II position and constructively discharged, Terry Ragin's claim that she was discriminatorily denied promotional opportunities, Lillie Ann Stewart McCain's claim of entitlement in 1977 to the job of data processing technician, and Wilma Oliphant's claim that she was discriminatorily denied a promotion are also dismissed with prejudice. As to the other claims of Anderson, Ragin and Oliphant, and those claims of the

other plaintiffs and class members where the court has found liability, the court will retain jurisdiction of the action for three (3) years from the entry of this judgment. The status of the action will be reviewed at that time and the action will be dismissed or retained as may then be appropriate.

This 21 day of June, 1983.

s/ James B. McMillan
James B. McMillan
United States District Judge

(3)
Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1438

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CHARLOTTE MEMORIAL HOSPITAL AND MEDICAL CENTER, et al.,

Petitioners

v.

WILMA OLIPHANT, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

JOHN T. NOCKLEBY*
Ferguson, Stein, Watt,
Wallas & Adkins, P.A.
951 S. Independence Blvd.
Charlotte, NC 28202
(704) 375-8461

MICHAEL A. SHEELY
730 East Trade Street
418 Law Building
Charlotte, NC 28202
(704) 376-6591

Counsel for Respondents
*Counsel of Record

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Rights Act of 1964)..... 1

Statement of the Case

This appeal arises out of two class action proceedings filed on November 2, 1978 and December 19, 1978, which were later consolidated for trial and appeal. Plaintiffs contended that the defendant Charlotte Memorial Hospital engaged in a pattern and practice of discriminating against black nonprofessional employees in certain respects, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended, and 42 U.S.C. §§1981 and 1983. After the trial of this matter in late 1981, and full consideration of thousands of pages of exhibits, testimony and briefs, 1/ the district court rendered extensive findings of fact

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1/ The record on appeal alone consists of 13 fat volumes. These volumes will be referred to herein as "___JApp.___."

and conclusions of law on June 20, 1983.

The district court found that between 1972 and 1981, the Hospital employed approximately 3,500 employees, of whom approximately 38% have been black. The court found that all of the Hospital's management and department heads are and have always been white, and virtually all supervisors and assistant supervisors are and have been white. (Supp.App. 8-9) Although the Hospital has fifty departments, no black employee was assigned to eighteen of the fifty departments as late as 1979. The vast majority of black employees have been segregated to five departments, including housekeeping, janitorial, cafeteria, and central services. Within the five departments, the district court found that black employees are disproportionately assigned to the

lowest paid positions like janitors, cleaners, cafeteria workers, and laborers. The court found that black employees with equal education, length of service, departmental assignment and work schedules were nevertheless paid between $.29 per hour and $.64 per hour less than white employees. (Supp.App. 10)

The district court also found that the Hospital employees numerous techniques which have been criticized for their tendency to mask racial bias. The Hospital fails to post vacancies or advise employees of promotional opportunities. White employees are secretly alerted, selected, and trained to fill openings before blacks are even given an opportunity to bid on them. (Supp.App. 12-13) Supervisors are not provided up-to-date written guidelines for initial job assignments, discipline, or

discharge. Interviewers are instructed to hide lists of available vacancies so that job applicants cannot request specific jobs. Blacks are routinely denied interdepartmental transfers, yet whites are routinely granted such transfers. (Supp.App. 11-13)

The district court also heard evidence on and ruled on numerous individual cases of discrimination, including claims of discriminatory discharge, finding in most instances that the defendant had discriminated against the employees. (Supp.App. 15-51) The district court found that plaintiffs had demonstrated a pattern of discriminatory initial job assignments, denial of interdepartmental transfers and terminations. The district court also rejected some of the individual and class

claims, and revised the class definition to conform to the proof.

In support of the district court's finding that the defendant engaged in a pattern of discriminatory terminations, statistical and anecdotal evidence demonstrated that blacks are discharged at rates ranging from 4.9 to nearly 7 standard deviations from the expected, a result which could have occurred randomly less than 1 in 10,000 times. (5 JApp. 1414-21) The defendant's statistical expert, Dr. Charles Haworth, admitted that "involuntary terminations are associated with race." (7 JApp. 1903-04) Of particular note is the following exchange between the district court and Dr. Haworth:

Q: Do you want to translate that a little more? You say that the statistics, as analyzed by Dr. Parrow [plaintiffs' expert], do show that involuntary terminations are associated with race?

A: Yes. It's not as if there was a random process by which people were involuntarily terminated.

(7 JApp. 1903-04)

The defendant did not offer any statistical, anecdotal or documentary evidence purporting to explain the enormous discrepancy between white and black terminations, and the district court concluded that plaintiffs had demonstrated a pattern of discriminatory discharges.

The Court of Appeals substantially affirmed. With respect to the evidence as to terminations, the court concluded that

the Hospital had "failed to point to any ... evidence in the record" which purported to explain the disparity in the termination rates. (App. at 19a) In its petition for rehearing, the defendant again claimed that it had presented such evidence, but the appeals court denied rehearing.

REASONS FOR DENYING THE WRIT

The District Court's Factual Finding That Petitioner Failed To Introduce Evidence Explaining The Extraordinarily High Minority Discharge Rate Does Not Warrant Review By This Court.

The evidence showed that black employees were terminated at a much higher rate than white employees. That these deviations might have occurred by chance was less than 1 in 10,000. Statisticians

accept as statistically significant deviations of 2 or greater. (5 JApp. 1414, 1416-18) Plaintiffs' expert, credited by the district court, concluded that race was a factor in the extraordinary black termination rate. (5 JApp. 1414-1421) Even defendant's expert conceded that the extraordinary termination differential suffered by black employees is "associated with race". The district court found that plaintiffs had demonstrated a pattern of racially discriminatory discharges.

The defendant does not challenge this conclusion. (Pet. 14) Rather, the single question presented by the Petition is whether both the district court and the court of appeals erred in finding that defendant failed to offer evidence explaining or rebutting this enormous disparity in discharge rates.

In essence, defendant is asking this Court to review the entire record to determine whether this single factual finding is supported. Defendant does not challenge the accuracy of scores of other findings. Moreover, defendant's arguments on this single finding were carefully considered by both of the lower courts and rejected. The district court found no evidence contradicting a pattern of discrimination. The court of appeals, which invested more than 14 months from the time of oral argument to its October 10, 1985 decision, rejected defendant's contentions in both the initial appeal and in defendant's petition for rehearing. The court of appeals specifically noted that "the Hospital has failed to point to any such evidence in the record." (App. at 19a) This Court should not invest its

limited resources in yet another canvass of the record, particularly where defendant's own expert has conceded that terminations are "associated" with race. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (194) and cases cited.

Moreover, the question presented for review is so ambiguous and narrow that its resolution would have no impact beyond the case at hand. The issue presented is merely a factual dispute that has simply been resolved adverse to defendant.

In United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983), the Court held that courts should focus on

the ultimate issue of discrimination vel non; whether the intermediate, shifting burdens of Burdine [2] have been met are essentially irrelevant to that ultimate issue once the evidence has been taken. Thus, Aikens indicates that the single question presented for review herein -- whether defendant met its intermediate burden of production -- is irrelevant to the ultimate issue of discrimination. In short, even if defendant were correct in its contentions as to what its evidence showed (and it is not), [3] reviewing the

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[2] Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[3] The Hospital claims that it introduced evidence of the reasons it discharged each minority person, but the record simply does not support this assertions. Defendant's evidence consisted solely of a chart reflecting hypothetical reasons for which an employee might be fired (1 JApp. 145) and a chart merely listing the number of employees

Footnote [3] continued

question would have no bearing on the ultimate question of discrimination.

Under the rule of Anderson v. City of Bessemer City, 470 U.S. 106 (1985), the district court is empowered to weigh evidentiary conflicts and credit plaintiffs' proof. Here, defendant specifically disclaims any challenge to the finding that plaintiffs made out a prima facie case of discriminatory terminations. (Pet. at 14) Since, under Anderson, the district court is entitled to credit plaintiffs' evidence, reviewing the narrow factual question presented herein would not

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3 / (continued)

terminated for various reasons such as absenteeism, insubordination, etc. (13 JApp. 3611-3615) At no point did the defendant attempt to explain why blacks were fired at a rate so much higher than whites. Indeed, the Hospital's expert admitted that race was "associated" with black terminations.

only have no impact on other discrimination cases, it would not change the result in this case.

Conclusion

The two lower courts carefully reviewed the record and ruled for plaintiffs on some matters and for the defendant on others. Both courts below (correctly) determined that petitioner offered no evidence contradicting the compelling pattern of discriminatory discharges. The question presented for review does not warrant review by this Court of thousands of pages of exhibits and testimony. There are no conflicts among the circuits and no legal questions which are even suggested to need resolution by this Court. Accordingly, the petition for a writ of certiorari should be denied.

This 27th day of March, 1986.

Respectfully submitted,

JONATHAN WALLAS
JOHN T. NOCKLEBY*
Ferguson, Stein, Watt, Wallas
& Adkins, P.A.
Suite 730
951 South Independence Blvd.
Charlotte, NC 28202
(704) 375-8461

MICHAEL A. SHEELY
Russell, Sheely and
Hollingsworth
730 East Trade Street
418 Law Building
Charlotte, NC 28202
(704) 376-6591

Counsel for Respondents
*Counsel of Record